

NO. COA14-955

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

MICHAEL RAY PATTON, Administrator  
of the Estate of THURMAN FRANKLIN  
PATTON, Deceased Employee,  
Plaintiff,

v.

From the North Carolina  
Industrial Commission  
I.C. No. 340739

SEARS ROEBUCK & CO.,  
Employer,

SPECIALTY RISK SERVICES, Carrier,  
Defendants.

Appeal by defendants from Opinion and Award entered 27 June  
2014 by the North Carolina Industrial Commission. Heard in the  
Court of Appeals 21 January 2015.

*Wallace and Graham, P.A., by Edward L. Pauley, for  
plaintiff.*

*Rudisill White & Kaplan, P.L.L.C., by Stephen Kushner, for  
defendants.*

ELMORE, Judge.

Sears Roebuck & Co. ("defendant-employer") and Specialty  
Risk Services (collectively "defendants") appeal from the North  
Carolina Industrial Commission's ("the Commission" or "the Full

Commission") Opinion and Award. After careful review, we affirm.

### **I. Facts**

Thurman Franklin Patton (the decedent) originally brought a claim for asbestosis against defendants in 2003. The decedent's claim was resolved through a compromise settlement agreement approved by the Commission on 27 April 2009. On 10 February 2010, the decedent passed away. The decedent's surviving spouse, Artie Patton, passed away on 29 August 2011. As such, the named plaintiff in this action is Michael Ray Patton, the decedent's son and the administrator of his estate.

On 27 June 2014, the Full Commission entered an Opinion and Award reversing the Deputy Commissioner's decision and concluding that the decedent's death was compensable under the North Carolina Workers' Compensation Act. The Commission awarded plaintiff, in relevant part, 400 weeks of compensation benefits at the weekly rate of \$400.01 and ordered defendants to pay plaintiff a burial fee of \$3,500.00.

The evidence before the Commission tended to show that the decedent worked for defendant-employer from 1958-1995 as a service technician. The decedent developed an expertise in the

repair, installation, and maintenance of home heating, ventilation, and air conditioning (HVAC) units.

Johnny Carroll, the decedent's co-worker, testified on behalf of plaintiff before the Commission. Defendant-employer employed Mr. Carroll as a service technician for approximately twenty-four years beginning in 1972. Mr. Carroll testified that he was the decedent's primary working partner from 1978-1995. The pair worked together approximately two days per week. On the other days, they worked on separate, but similar service calls. On average, each would respond to six to ten service calls per day.

Mr. Carroll testified that he and the decedent repaired furnaces between October and March on almost a daily basis. Prior to 1978, most of the decedent's work also involved furnace installations. Mr. Carroll stated that the furnaces contained asbestos materials, including asbestos rope gaskets, asbestos tape, and asbestos cement.

Jerry Dean Davis, a retired employee of defendant-employer, testified that he worked as a service technician for thirty-eight years beginning in August 1971. Mr. Davis testified that he likely went on service calls with the decedent. Mr. Davis recalled that the only time an employee would work on a furnace

call would be "in the wintertime." He also testified that he reasonably believed the decedent would have been exposed to asbestos for thirty days in a seven-month period while working for defendant-employer. However, he clarified that he assumed the decedent would have been exposed to asbestos insulation, but he was unsure of whether the decedent was actually exposed to asbestos at that frequency.

Dr. Marc Guerra, the decedent's treating physician, testified it was his understanding that the decedent was exposed to asbestos while doing appliance repairs for defendant-employer. Dr. Guerra treated the decedent for lung problems, shortness of breath, and heart issues. Dr. Guerra testified that asbestosis was a major contributing factor in the decedent's death. When he signed the decedent's death certificate, he listed the decedent's cause of death as asbestosis and chronic obstructive pulmonary disease (COPD).

Plaintiff tendered Dr. Jill Ohar as an expert in pulmonology, internal medicine, and asbestosis-related disease. Dr. Ohar reviewed the decedent's medical records and concluded that he had "clear pathological and radiographic evidence of asbestosis."

On appeal, defendants neither contend that the decedent was not exposed to asbestos at work nor do they deny that he had asbestosis. Instead, they argue that the decedent was not entitled to compensation for this disease because his exposure was not great enough to maintain a claim for benefits and because it is unclear whether his exposure to asbestos caused or significantly contributed to his death. As such, defendants now appeal the Commission's Opinion and Award.

## **II. Analysis**

### **a.) Asbestos Exposure**

Defendants argue that the Commission erred in finding that the decedent was exposed to asbestos for thirty days within a consecutive seven-month period. We disagree.

This Court reviews an Opinion and Award of the Industrial Commission to determine whether any competent evidence exists to support the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The

Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139.

For an injury or death to be compensable under the North Carolina Workers' Compensation Act "it must be either the result of an accident arising out of and in the course of the employment or an occupational disease." *Keel v. H & V Inc.*, 107 N.C. App. 536, 539, 421 S.E.2d 362, 365 (1992) (citations and quotation marks omitted).

N.C. Gen. Stat. § 97-57 provides, in relevant part, that "[i]n any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." N.C. Gen. Stat. § 97-57 (2013). "Under the statute, with respect to asbestosis or silicosis, the worker must have been exposed for 30 working days within seven consecutive months in order for the exposure to be deemed injurious." *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 509, 616 S.E.2d 356, 365 (2005).

Defendants argue that the only evidence that the decedent was exposed to asbestos came from Mr. Carroll, who worked with the decedent approximately twice per week. Defendants calculated that at a rate of twice per week over the six-month winter season, the

decedent and Mr. Carroll would have worked together between 48-52 days. Except for when the decedent worked with Mr. Carroll, defendants contend that there is no evidence that the decedent was exposed to asbestos.

Defendants argue that it was faulty for the Commission to assume that each of the 48-52 days involved exposure to asbestos: "There is no reliable way to discern . . . from [the testimony], how many of those calls would have involved exposure to asbestos." Therefore, defendants contend that the record is devoid of competent evidence showing that the decedent was exposed to asbestos for thirty days within a seven-month period.

Defendants' argument is misguided. In the instant case, findings #3, #7, and #14 show that plaintiff was exposed to asbestos for thirty days within a seven-month period:

3. Furnace repairs and maintenance were primarily done from October to March. Decedent worked on furnaces almost every day during those months. Most of Decedent's work involved maintenance on older furnaces; however, prior to 1978, Decedent performed many furnace installations for Defendant-Employer.

. . . .

7. Evidence was presented that Decedent worked around asbestos products during his employment with [Defendant-Employer]. During the 1970s and 1980s, Decedent worked with or around asbestos products a minimum of five or six times a month. Therefore, in

the typical October to March period when furnaces were installed, repaired or maintained, Decedent was exposed to asbestos at a minimum of thirty to thirty-six days.

. . .

14. The Full Commission finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent had exposure to asbestos fibers for at least thirty days within a seven consecutive month period while in the employ of Defendant-Employer. The Full Commission also finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent's last injurious exposure to asbestos fibers occurred while he was in the employ of Defendant-Employer. The Full Commission further finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent did, in fact, have asbestosis.

These findings of fact are supported by competent evidence in the record.

Mr. Davis testified that defendant-employer's furnaces contained asbestos in the 1960's and 1970's "until the asbestos . . . scare started." He further testified that furnace repair primarily occurred in the winter months. When asked whether it was reasonable to conclude that the decedent would have worked with furnaces and other appliances that had asbestos on them for at least thirty days in a seven-month period, he replied, "yeah, that would sound reasonable, yeah."

Mr. Carroll testified that he and the decedent would respond to three or four furnace calls per week. Of the furnace calls in the 1970's and 1980's between October and March, they would work with asbestos products at a minimum of five or six times per month. Therefore, plaintiff provided evidence that the decedent was exposed to asbestos between thirty and thirty-six times within a consecutive six-month period.

In sum, Mr. Davis' testimony coupled with other competent testimony to show that the decedent was exposed to asbestos for at least thirty days within six consecutive months necessarily support the Commission's finding that the decedent was exposed to asbestos for a minimum of thirty days within a seven-month period.

**b.) Contributing Factor**

Defendants also contend that the Full Commission erred in finding that the decedent's occupational exposure to asbestos was a significant contributing factor in his death. We disagree.

Pursuant to N.C. Gen. Stat. § 97-38, death resulting from a disease is compensable only when "the disease is an occupational disease, or is aggravated or accelerated by" conditions and causes specific to a claimant's employment. *Walston v. Burlington Industries*, 304 N.C. 670, 679-80, 285 S.E.2d 822, 828

(1982). Asbestosis may be an occupational disease provided that the worker's exposure to substances peculiar to the occupation in question "significantly contributed to, or was a significant causal factor in," the development of the disease. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983).

In determining whether exposure to an occupational substance significantly contributed to, or was a significant causal factor in, [a] disease, the Commission may consider medical testimony as well as other factual circumstances in the case, including the extent of the worker's exposure to the substance, the extent of non-occupational but contributing factors, and the manner of development of the disease as it relates to the claimant's work history. The burden of proving the existence of a compensable claim is upon the claimant.

*Goodman v. Cone Mills Corp.*, 75 N.C. App. 493, 497, 331 S.E.2d 261, 264 (1985) (citations omitted).

As to the decedent's cause of death, the Commission made the following findings of fact:

11. The death certificate for Decedent lists asbestosis and COPD as the causes of death. Dr. Guerra signed the death certificate. Dr. Guerra opined that asbestosis significantly contributed to Decedent's death and that Plaintiff died 'secondary to respiratory failure related to his restrictive lung disease/asbestosis and COPD.'

. . . .

12. Dr. Ohar testified that the most likely cause of death was arrhythmia or irregular heart beat caused by a lack of oxygen getting to the heart but that 'asbestosis certainly was a contributing cause" to Decedent's death and that 'terminal lung disease drove the train to his death.' Dr. Ohar testified that the arrhythmia [sic] would be most likely traced back to the COPD and asbestosis and that the autopsy confirmed the presence of asbestosis.

. . .

16. Prior to his death, Decedent was suffering from asbestosis caused by his exposure to asbestos while working for Defendant-Employer.

17. Based upon a preponderance of evidence in view of the entire record, the Full Commission finds that Decedent's work-related asbestosis condition was a significant contributing and causal factor in his death.

The evidence supports each of the Commission's findings relating to causation. Specifically, in support of finding #11, the record contains a copy of the decedent's death certificate signed by Dr. Guerra that clearly lists asbestosis as a cause of death. In addition, the record shows that Dr. Guerra did in fact testify that the decedent died "secondary to respiratory failure related to his restrictive lung disease/asbestosis and COPD[,]" as the Full Commission found. In support of findings #12, and #16, and #17, Dr. Ohar testified to a reasonable degree

of medical certainty that the decedent "had a history of asbestos exposure and had evidence of asbestosis. And the asbestosis certainly was a contributing cause to his death." Moreover, both Mr. Carroll and Mr. Davis, the decedent's co-workers, testified that the decedent was exposed to asbestos while working for defendant-employer.

Accordingly, competent evidence shows that 1.) the decedent's exposure to asbestos contributed to his disease and 2.) the occupational disease of asbestosis significantly contributed to the decedent's death. Thus, defendants' argument fails.

### **III. Conclusion**

In sum, the findings of fact that 1.) plaintiff was exposed to asbestos for a minimum of thirty days within a consecutive seven-month period and 2.) the decedent's occupational exposure to asbestos was a significant contributing factor in his death are both supported by competent evidence. Thus, we affirm the Commission's Opinion and Award.

Affirmed.

Judges DAVIS and TYSON concur.